



December 22, 1999

Ms. Mary Marquez
Assistant to Chief Counsel
Capital Metro Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR99-3724

Dear Ms. Marquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130510.

The Capital Metro Transportation Authority (the "authority") received two requests from the Longhorn Railroad Company for eight categories of information relating to the operations of the authority, the Giddings-Llano rail line, and the requestor. You claim that the requested information is excepted from disclosure under sections 552.103, 552.104, and 552.107(1)(b) of the Government Code. You have provided a representative sample of the information to this office for review.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston*

Post Co., 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Further, to be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated on the date that the information was requested. Gov't Code § 552.103(c). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and where a potential party threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You relate that the requestor and the authority are parties to a contract; that the requestor threatened litigation regarding this contract; and that both parties have retained counsel. From our review of the submitted materials, we also note that each party has served and been served with a "notice of default" alleging specific breeches of the subject contract. From your representations and a review of the submitted materials we conclude that litigation was reasonably anticipated by the authority at the time of its receipt of the subject requests for information.

To determine that the information relates to the anticipated or pending litigation, we follow the rule that "ordinarily, the words 'related to' mean 'pertaining to,' 'associated with' or 'connected with.'" *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.). We conclude that the submitted materials identified as attachments H, I, J, K, and L relate to the anticipated litigation.

However, 552.103(a) does not except all information from disclosure. Absent special circumstances, where the opposing party to the anticipated litigation has had access to the records at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). Therefore, those items which the opposing party in litigation has had access to are not excepted from disclosure by Government Code section 552.103. Further, attachment J is a contract with a governmental body; such documents may only

be withheld on a showing that they are made confidential by law. Gov't Code §552.022(a)(3). As no such demonstration has been made, this document cannot be withheld. Also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect the purchasing interests of a governmental body, usually in competitive bidding situations prior to the awarding of a contract. Open Records Decision No. 593 at 2 (1991).

Referring to the information in exhibits E and F, you state that "the information requested is being used during an open procurement process and a contract has not been awarded." In Open Records Decision No. 170 (1977), this office stated that

[s]o long as negotiations are in progress regarding interpretation of bid provisions, and so long as any bidder remains at liberty to furnish additional information relating to its proposed contract, we believe that the bidding should be deemed competitive. Release of the bids while the bidding is still competitive would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract being let.

Open Records Decision No. 170 at 2 (1977). As long as the bidding process is "still competitive" under the standard enunciated above, you may withhold the information in exhibits E and F from disclosure under section 552.104. However, once a contract has been executed and the competitive bidding process is completed, you may not continue to withhold this information under section 552.104. See Open Records Decision No. 541 (1990).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. See Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and client confidences. *Id.* We also note that information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege is not excepted from required public disclosure unless it is made expressly confidential under other law. Gov't Code § 552.022(a)(16). In Open Records Decision No. 574, this office concluded that generally "the attorney's mere documentation of calls made, meetings attended, or memos sent is not protected under [the statutory predecessor to section 552.107(1)], if no notes revealing the attorney's legal advice or the client's confidences are included. Such documentation simply does not embody attorney-client communication." ORD 574 at 7.

See also Open Records Decision No. 589 (1991). You contend that information submitted in your exhibit G, including memoranda and portions of an attorney billing statement, are excepted from required public disclosure by this section. Although many entries in the billing statement reveal the subject matter of conferences that have taken place between the attorney and city officials, most of those entries do not reveal the substance of those conversations. Similarly, the fact that the attorney performed legal research regarding a broad legal issue does not reveal any legal advice the attorney may have rendered to the client. We have marked the portions of the materials in exhibit G that the authority may withhold pursuant to the attorney-client privilege. The remaining portions of exhibit G must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

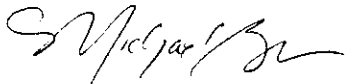
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/nc

Ref: ID# 130510

Encl: Submitted documents

cc: Mr. Donald T. Cheatham
The Longhorn Railway Company
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(w/o enclosures)